

REMARKS

Claims 10 and 16 are pending in this application through this Response. Claim 16 is currently amended. No new matter is introduced. Applicants respectfully request reconsideration.

Applicants note that claims 10 and 16 were previously indicated to be allowable. In fact, the Applicants relied on the Office's indication that claims 10 and 16 were allowable and filed a petition to revive an unintentionally abandoned application and a request for continued examination. It is rather troubling that a previous examiner conducted a presumably complete search and indicated claims to be allowable and only after the Applicants expended considerable time and expense in reliance on the Examiner's finding of allowable subject matter that the Office conducts a "new" search and finds additional art, art which could have been discovered sooner but for the previous examiner's incomplete search. The patent process was never meant to be adversarial, but rather the Applicant and the Examiner should work together to determine the patentable subject (if there is any). Over the past several years, the Office seems to have diverged from its traditional role of working with Applicants to issue valid patents to one of making the Applicants engage in an "adversarial game" where the Applicants have the burden of proving that the claimed subject matter is patentable and the Office functions primarily to obstruct Applicants' efforts.

In light of this, the undersigned respectfully pleads with the Office to work cooperatively with the Applicants to move this case (finally) to a resolution.

Claim Objections

Claim 16 stands objected to because the Examiner believes that the claim is not in proper format. Applicants respectfully traverse this objection. Claim 16 is a proper "Jepson-type" claim (e.g., "In a _____, the improvement therein comprising ...). See e.g., 37 CFR §1.75(e) and MPEP § 608.01(m)). Additionally, the objection to the label of claim 16 is now moot. Applicant respectfully requests that these objections be withdrawn.

Claim Rejection Under 35 USC §102(e)

Claim 16 stands rejected under 35 U.S.C. 102(e) as being anticipated by *Prejean* (US 6,988,588). Applicants respectfully traverse this rejection. Nevertheless, to advance prosecution, Applicants have amended claim 16 to clarify the claimed invention.

As amended, independent claim 16 recites that the pair of footholds each comprises a curved elongate body portion and a clamping portion attached to the support arms. Moreover, the amended claim states that the footholds are attached to only the support arms. These features are simply not disclosed, taught, or suggest by *Prejean*. Rather, *Prejean* teaches:

Additional support for pivot arm support members 44--44 is also provided by foot receiving members 44b--44b which are rigidly connected to pivot arm support members 44--44 and to V-shaped bracing member 30. Foot receiving members 44b--44b are also configured to receive each foot of the user therein to enable the user raise or lower standing platform 20 when seated as indicated in FIG. 9 without the difficulty of bending down and installing foot straps as taught in the prior art. Furthermore, foot receiving members 44b--44b offer the user better control of standing platform 20 when climbing due to solid contact of the feet of the user with the standing platform 20 on four sides of each foot. Column 4, lines 5-17.

Nothing in *Prejean* teaches a pair of footholds with a curved elongate body, each having a clamping portion attached to the support arms of the climbing tree stand. Moreover, the foot receiving member 44b are connected to both the arms and the bracing member. Accordingly, Applicants respectfully request that this rejection be withdrawn.

Claim Rejection Under 35 USC §103(a)

Claim 10 stands rejected under 35 U.S.C. 103(a) as being anticipated by *Prejean* (US 6,988,588) in view of *Curtis* (US 2,057,013). Applicants respectfully traverse this rejection on at least the grounds that the Examiner has failed to establish a *prima facie* case of obviousness and that the improper combination fails to teach the claimed invention.

Office policy is to follow *Graham v. John Deere Co.* in the consideration and determination of obviousness under 35 U.S.C. §103. The four factual inquiries enunciated therein as a background for determining obviousness are as follows:

- (A) Determining the scope and content of the prior art;
- (B) Ascertaining the differences between the prior art and the claims in issue;
- (C) Resolving the level of ordinary skill in the pertinent art; and
- (D) Evaluating evidence of secondary considerations. MPEP 2141.

When applying 35 U.S.C. §103, the following tenets of patent law must be adhered to:

- (A) The claimed invention must be considered as a whole;
- (B) The references must be considered as a whole and must suggest the desirability and thus the obviousness of making the combination;
- (C) The references must be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention; and
- (D) Reasonable expectation of success is the standard with which obviousness is determined. *See, e.g.*, MPEP 2141, 2141.01, and 2141.02.

“The legal concept of *prima facie* obviousness is a procedural tool of examination which applies broadly to all arts. It allocates who has the burden of going forward with production of evidence in each step of the examination process.” MPEP 2142. “The examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness. If the examiner does not produce a *prima facie* case, the applicant is under no obligation to submit evidence of nonobviousness. If, however, the examiner does produce a *prima facie* case, the burden of coming forward with evidence or arguments shifts to the applicant who may submit additional evidence of nonobviousness.” MPEP 2142.

“To reach a proper determination under 35 U.S.C. 103, the examiner must step backward in time and into the shoes worn by the hypothetical ‘person of ordinary skill in the art’ when the invention was unknown and just before it was made. In view of all factual information, the examiner must then make a determination whether the claimed invention

'as a whole' would have been obvious at that time to that person. Knowledge of applicant's disclosure must be put aside in reaching this determination, yet kept in mind in order to determine the 'differences,' conduct the search and evaluate the 'subject matter as a whole' of the invention. The tendency to resort to 'hindsight' based upon applicant's disclosure is often difficult to avoid due to the very nature of the examination process. However, impermissible hindsight must be avoided and the legal conclusion must be reached on the basis of the facts gleaned from the prior art." MPEP 2142.

"The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. The Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 U.S. ___, ___, 82 USPQ2d 1385, 1396 (2007) noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. The Federal Circuit has stated that 'rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.' *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006). See also KSR, 550 U.S. at ___, 82 USPQ2d at 1396 (quoting Federal Circuit statement with approval)." MPEP 2142.

Moreover, "[t]he examiner must determine what is 'analogous prior art' for the purpose of analyzing the obviousness of the subject matter at issue. 'Under the correct analysis, any need or problem known in the field of endeavor at the time of the invention and addressed by the patent [or application at issue] can provide a reason for combining the elements in the manner claimed.'" MPEP 2141.01(a) quoting *KSR International Co. v. Teleflex Inc.*, 550 U.S. ___, ___, 82 USPQ2d 1385, 1397 (2007). "Thus a reference in a field different from that of applicant's endeavor may be reasonably pertinent if it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his or her invention as a whole." MPEP 2141.01(a).

Here, the Examiner has provided no logical reason why one skilled in the art would combine the climbing tree stand of *Prejean* with the stilt of *Curtis*. Contrary to the Examiner's assertion on page 4 of the Office Action, *Curtis* does not teach a climbing platform, but rather *Curtis* teaches stilts. A pair of stilts can be generally described as a

pair of poles with foot rests in the middle used for walking above the ground. One skilled in the art would not look to art discussing stilts for modifying a climbing tree stand because clearly one would not use a pair of stilts to climb a tree. Such would be ridiculous. As such, the two pieces of prior art are not analogous. Accordingly, this rejection is improper and should be withdrawn.¹

Moreover, even if this combination were proper (and Applicants maintain that it is not), the combination does not teach the claimed invention. *Curtis* teaches a stilt stirrup having resilient (i.e., flexible) curved metal strap 14 that is pivotally conned by a pin 18 at one end and that includes a projecting tongue 15 with a rack of teeth 16 at its other end. The stirrup further includes a pawl for receiving the teeth 16 of the tongue 15. Combining this with the generally straight foot receiving member 44b of *Prejean* would not yield Applicants' claimed invention of claim 10. Accordingly, this rejection should be withdrawn.

CONCLUSION

In view of the foregoing, it is respectfully submitted that all grounds of rejection have been overcome. Applicants therefore respectfully solicit allowance of the application. Should there be any further questions or concerns, the Examiner is urged to telephone the undersigned.

Respectfully submitted,

GARDNER GROFF
GREENWALD & VILLANUEVA, PC

/Arthur A. Gardner/
Arthur A. Gardner, Reg. No. 33,887

Customer Number: 23506
GARDNER GROFF GREENWALD & VILLANUEVA, PC
Tel: 770/984-2300
Fax: 770/984-0098

¹ Combining dissimilar art in different art units in illogical manners is why more and more applicants are forced into taking appeals to the Board.